No. 22-174

IN THE

Supreme Court of the United States

GERALD E. GROFF,

Petitioner,

v.

LOUIS DEJOY, POSTMASTER GENERAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* FOUNDERS' FIRST FREEDOM, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* FOUNDERS' FIRST FREEDOM[1]

Founders' First Freedom, Inc. is a 501(c)(3) nonprofit organization incorporated in 2005 that upholds liberty of conscience and freedom from religious discrimination. The organization and its board members have long advocated for a reasonable and consistent religious accommodation standard at the federal and state level throughout the nation in Congress, state legislatures, and in the courts.

Founders' First Freedom is the successor organization to the Council on Religious Freedom, a nonpartisan, nonprofit national advocacy group formed in 1986 to advocate for protecting and preserving the Free Exercise and Establishment Clauses of the U.S. Constitution.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 requires employers to "reasonably accommodate" an employee's religious observance or practice unless the accommodation imposes an "undue hardship" on the employer. 42 U.S.C. § 2000e(j) incorporated into the Civil Rights of 1964 in 1972.

In the words of the statute, "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* to an employee's or prospective employee's religious observance

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[1] No counsel for a party authored this brief, in whole or in part. No counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No other person has made such a monetary contribution.

or practice without *undue hardship* on the conduct of the employer's business." *Id.*

Although Congress intended to bolster the rights of employees to religious accommodation, the words "undue hardship" were so diminished in the dicta of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) as to render the protection useless in several judicial circuits. The *Hardison* Court wrote that Title VII does not require any kind of accommodation of an employee's religious practice if doing so would impose more than a *de minimis* burden. Congress did not intend that religious accommodation be turned into a mere intellectual exercise.

We request that this Court reconsider the meaning of the term "undue hardship" in Title VII and bring its jurisprudence into line with the clear meaning and intent of the language of the statute.

We also ask that the Court reject the notion that an employer may ignore Title VII accommodation requests merely by claiming the requested accommodation causes an "undue hardship," on co-workers rather than the business itself.

ARGUMENT

I. Why This Court Should Reject *Hardison's* "More-Than-De-Minimis-Cost" Test in Title VII religious Accommodation Cases and Restore the Meaning of "Undue Hardship" That Congress Intended

The Court's 1977 decision in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) sent shockwaves through religious communities across the United States as people of faith learned that employers no longer had to

accommodate their religious practices so long as the employer could claim that they would bear a "de minimis cost" to accommodate them.

In his dissent, Thurgood Marshall wrote, "Today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." 432 U.S. 63, 86.

At the time, Title VII of the Civil Rights Act of 1964 was the freshly minted cornerstone of American civil liberties, giving intention and teeth to the promise that all people "are created equal." It prohibited discrimination based on race, color, sex, religion, or national origin.

But, Congress had not included specific language requiring *accommodation* of religious beliefs and practices, rather than identity or affiliation. So employers began to refuse to accommodate religious practices, concluding that these accommodations amounted to "discrimination" against non-religious employees.

In 1967, the Equal Employment Opportunity Commission (EEOC) Guidelines declared that an employer had an obligation under the statute to accommodate religious needs "where such accommodation can be made without *serious inconvenience* to the conduct of the business." 29 C.F.R. § 1605.1 (1967).

The next year, the EEOC amended the guidelines to change the term "serious inconvenience" to a more stringent "undue hardship" standard, which "may exist where another employee of substantially similar qualifications cannot perform the employee's required work during the period of absence of the Sabbath keeper." 29 C.F.R. § 1605.1 (1968) [codifying the 1967 Guidelines].

Despite the clarity of the accommodation requirement, the courts disregarded the Guidelines. For instance, in *Dewey v. Reynolds Metal Co.,* 429 F.2d 324 (6th Cir. 1970) *affirmed by an equally divided Court,* 402 U.S. 689 (1971), the Supreme Court affirmed a Sixth Circuit decision that failure to accommodate an employee's religious observance differed from religious discrimination and even questioned whether the EEOC could issue such guidelines. *Id.* at 331 n.1.

Workplace religious accommodation rights continued to slip in 1972 when the Fifth Circuit reasoned that religious accommodation is an impossibility and applied this rationale against a Seventh-day Adventist who was terminated for insubordination when he refused to work on his Sabbath. See *Riley v. Bendix Corp*. 330 F. Supp. 583 (M.D. Fla. 1971), rev'd, 464 F.2d 1113 (5th Cir. 1972). The *Riley* court wrote, "If one accepts a position knowing that it may in some way impinge upon his religious beliefs, he must conform to the working conditions of his employer or seek other employment." *Id.* at 590.

In 1972, Congress realized that the courts were ignoring the 1967 EEOC Guidelines and that rights for accommodation needed to be strengthened. So Congress amended the Civil Rights Act of 1964 to incorporate an affirmative duty to accommodate religious practice. Under § 2000e(j), designated § 701(j) of the Civil Rights Act of 1964, Congress added language stating, "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee's or prospective employee's religious observance or prac-

tice without undue hardship on the conduct of the employer's business."

When he introduced the 1972 legislation, Senator Jennings Randolph explained its purpose, "Unfortunately, the courts have, in a sense, come down on both sides of this issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question. This amendment is intended, in good purpose, to resolve by legislation – and in a way I think was originally intended by the Civil Rights Act – that which the courts have apparently not resolved." 118 Cong. Rec. 705-06 (1972).

Despite the 1972 legislation, some employers continued to seek ways to avoid accommodating employees' religious practices. In 1977, the case of *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) reached the United States Supreme Court. It involved a Worldwide Church of God member who was terminated for insubordination for refusing to violate his religious beliefs and work on his Sabbath. Although the employer had been willing for him to swap shifts, the labor union did not approve the accommodation because it would ostensibly violate a collective bargaining agreement provision.

But although Congress now included the arguably stronger term "undue hardship" language, the *Hardison* Court, in dicta, redefined "undue hardship" to the point where it all but disappeared. The message from the Court was that no matter what Congress or the EEOC did to shore up accommodation requirements, if an employer were required to bear any inconvenience greater than a *de minimis* cost in providing an accommodation, it would constitute an undue hardship, *id.* at 84.

The Petitioner's brief cites the "ordinary meaning" method of determining what "undue hardship" means. It observes that, according to The Random House Dictionary of the English Language, p. 602, "undue" means "unwarranted," "excessive," "unjustifiable," or "improper. "Hardship" means "a condition that is difficult to endure," "suffering," or "something hard to bear." *Id.*

It also notes that Black's Law Dictionary 482 (4th ed. 1968) defines "de minimis" as involving "very small or trifling matters" that "[t]he law does not concern itself" about.

Yet Congress did not leave the definition of "undue hardship" to the writers of dictionaries. Instead, as James Cleith Phillips points out in his paper, "Ordinary Meaning as Last Resort: The Meaning of "Undue Hardship" in Title VII" (February 18, 2023). SSRN: https://ssrn.com/abstract=43563032) and, as noted in Petitioner's brief filed in this matter that 'Congress has typically defined undue hardship throughout the U.S. Code according to its plain meaning,' in the Americans with Disabilities Act (1990), the Uniformed Services Employment and Reemployment Rights Act (1994), and the Affordable Care Act (2010)." *Id.* at 28 (quoting No. 22-174, available at https://www.supremecourt.gov/DocketPDF/22/22-174/234280/20220823143151190_Groff%20Cert%20Petition.pdf).

Congress has not created a multiple-tier structure where the term "undue hardship" means dramatically different things to different classes that enjoy protection under Title VII. The EEOC has been clear about its meaning, the only divergence being the dicta of *Hardison.*

"De minimis" cost or expense means the opposite of "undue hardship," yet, since 1977, many good employees who have sought religious accommodations have held so tightly to their religious convictions that they have walked away from their livelihoods or been fired, knowing that their financial well-being was placed in jeopardy because their employers relying on *Hardison* dicta found "very small or trifling" reasons to refuse their requests for an accommodation.

After the sweeping *Hardison* decision, many employers believed they were now relieved of any affirmative duty to accommodate religious beliefs under §2000e(j), a situation that the EEOC addressed in a series of meetings held across the United States in 1978. *Hearings before the United States Equal Employment Opportunity Commission (EEOC) on Religious Accommodation: Hearings Held in New York, NY, Los Angeles, CA, and Milwaukee, WI*, *April-May 1978.* Washington, D.C.: United States Equal Employment Opportunity Commission, 1978, p.2 (statement of commissioner Eleanor Holmes Norton, Chair).

While the term "undue hardship" no longer had substantive meaning when it came to religious accommodation post-*Hardison*, it still maintains its traditional meaning in other contexts. For example the EEOC promulgates a very workable and reasonable "undue hardship" definition and standard in its "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA" https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada EEOC-CVG-2003-1 issued 10/17/2017. It states while "[a]n employer does not have to provide a reasonable accommodation that would cause an 'undue hardship' to the employer. Generalized conclu-

sions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense." These particular EEOC Guidelines state:

> "A determination of undue hardship should be based on several factors, including:
>
> - The nature and cost of the accommodation needed;
> - The overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
> - the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
> - the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
> - the impact of the accommodation on the operation of the facility

These EEOC Guidelines provide a template that considers whether an individual accommodation proposal causes significant difficulty or expense, considering the individual circumstances that employers and their employees face. Should these Guidelines be applied to

religious accommodation situations, this method would provide a workable, consistent, and defensible rubric for employers who seek to determine whether a religious accommodation request can be granted. Such an approach would be consistent with the Congressional intent in religious accommodation settings; and would certainly be preferred to the disastrous *de minimis* standard of *Hardison*.

II. If Employers Could establish "Undue Hardship" Under Title VII Merely By Showing That the Requested Accommodation May Inconvenience The Religious Employee's Co-Workers, It Would Enshrine the Very Forms of Discrimination Title VII Was Meant To Alleviate

In many cases, co-workers may feel a burden when an employer thoughtfully evaluates a situation and determines that a religious accommodation is possible. It is easy to understand the frustration that co-workers may feel when their religious co-workers are granted a desirable Title VII scheduling accommodation consistent with their sincerely held religious beliefs.

But if non-religious co-workers' dissatisfaction with a religious employee's lawfully asserted and awarded Title VII accommodation were enough to render the accommodation unavailable, it would increase the very forms of discrimination that Title VII was meant to alleviate. An employer's good faith effort to provide religious accommodation would be redefined as discrimination against non-religious employees.

This claim of reverse discrimination is not novel. Soon after Title VII was implemented in 1964, employers who did not wish to accommodate religious employees tried to argue that providing accommoda-

tion was equivalent to discriminating against non-religious employees. The EEOC observed this and issued Guidelines in 1966 that made it clear that employers should attempt to accommodate "where such accommodation can be made without serious inconvenience to the conduct of the business." It then changed the term "serious inconvenience" to "undue hardship," which "may exist where the employee's required work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath keeper." 29 C.F.R. § 1605.1 (1968).

Then Congress itself, fully aware of the employer's claims that non-religious employees could make a claim for reverse discrimination, incorporated the original undue hardship language in its 1972 amendment to the Civil Rights Act in § 2000e(j).

To draw an analogy from the First Amendment speech field, affording non-religious employees the right to claim discrimination when religious employees were accommodated would create a kind of heckler's or co-employee's veto, and Title VII would be rendered nearly useless as to religious practices.

If the "de minimis" standard of *Hardison* were to survive, and this Court accepted burdens on co-workers as equivalent to those on the employer's business, then a "de minimis" burden to a co-worker would be enough to scrap the required religious accommodation. This outcome would open the employer who attempted to provide a Title VII accommodation to a new string of lawsuits from non-religious co-workers.

CONCLUSION

America is enriched by its tradition and diversity of faith. Since 1977, many people of faith have been routinely denied employment opportunities or been forced to resign or be terminated because employers have refused to make reasonable attempts to accommodate their religious beliefs, relying on a cursory conclusion that such an accommodation need not require more than a "de minimis" cost.

As Justice Marshall observed in *Hardison*, "The ultimate tragedy is that despite Congress' best efforts, one of this nation's pillars of strength – our hospitality to religious diversity – has been seriously eroded. All Americans will be a little poorer until today's decision is erased." 423 U.S. 63, 97.

The Court now has an opportunity to correct this error and restore Congress' original intent that an employer must provide an accommodation "unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Respectfully submitted,

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